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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

ST. LOUIS SOUTHWESTERN RAILWAY CO. ..... *Petitioner,*

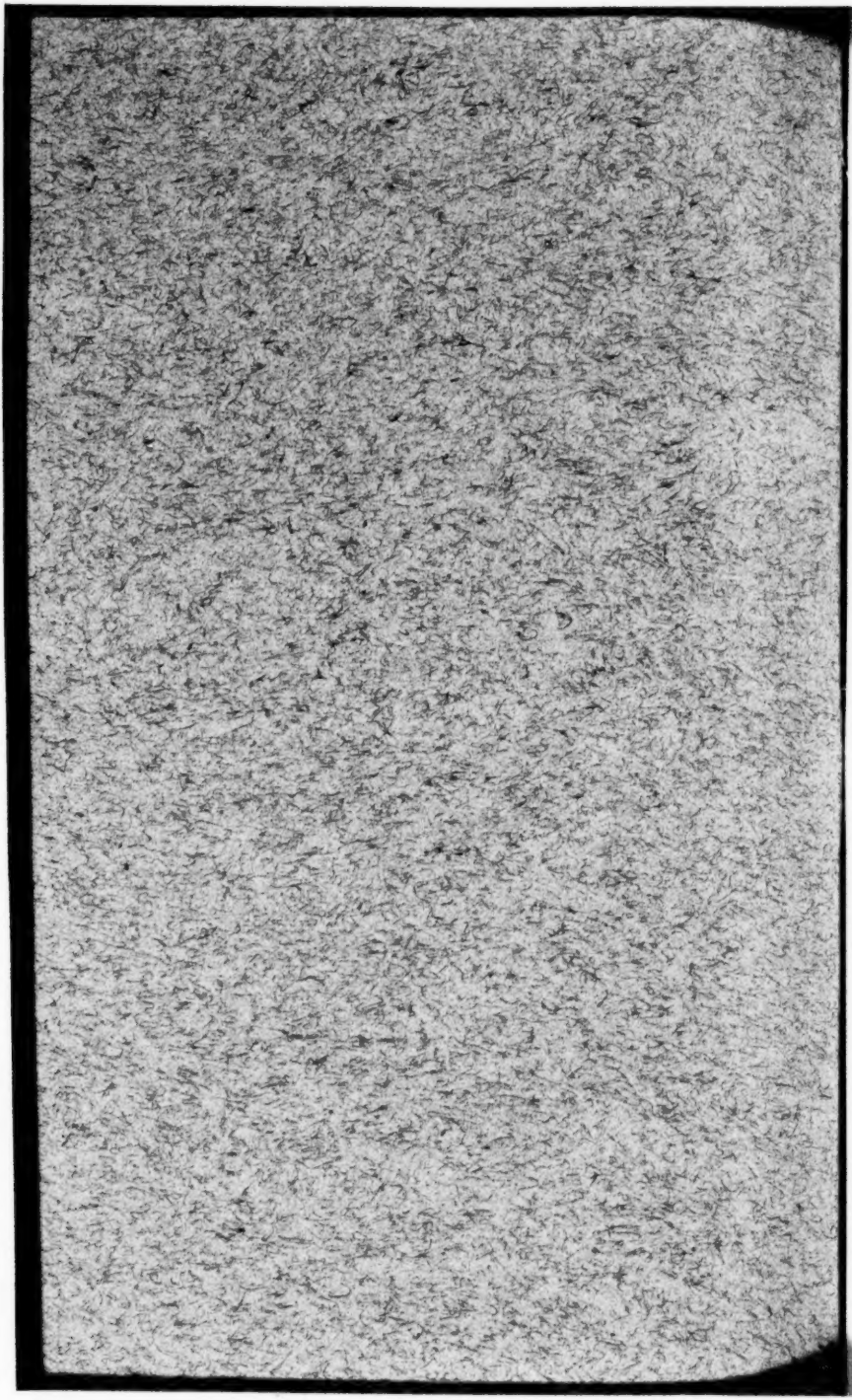
v. No. 364

MISSOURI PACIFIC RAILROAD COMPANY ..... *Respondent.*

MISSOURI PACIFIC RAILROAD COMPANY'S RESPONSE AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

ROBERT E. WILEY,

Attorney for Respondent.



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RESPONSE

The Missouri Pacific Railroad Company asks that the brief be taken as its response to the petition for a writ of certiorari.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE QUESTION WHETHER THE MISSOURI PACIFIC'S PROPOSED TRACK IS A SPUR TRACK OR AN EXTENSION WAS NOT IN ISSUE IN THIS PROCEEDING.

The proceeding originated before the Arkansas Railroad Commission. The Arkansas statute provides that any appeal from that commission's order must be heard upon the record made before the commission. That statute after providing for an appeal to the circuit court of Pulaski County and the lodging in said circuit court of a full and complete transcript of all proceedings had before said commission and of all evidence before it, provides as follows:

"The said circuit court shall thereupon review such order upon the record presented as aforesaid in the case and enter its finding and order thereon and cause to be certified forthwith to said commission such order." Section 8417 z3 of Castle's 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas.

Therefore, no issue can be brought into the case that was not involved before the Railroad Commission.

Before that Commission the case was heard and the record made solely on the Missouri Pacific Railroad Company's application for a crossing, no other pleading being filed.

That application of the Missouri Pacific Railroad Company (R. 2-3) was filed pursuant to Section 8417 q1 of 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas, which is also found as Section 1643 of Crawford & Moses' Digest of Statutes of Arkansas.

That application did not ask for authority to construct any track. It invoked the Railroad Commission's regulatory jurisdiction over railroad crossings. It asked the Commission to fix the point and the manner of crossing and the terms of installation, operation, maintenance and protection thereof.

Proceeding under that statute (Section 8417 q1 of 1927 Supplement of Crawford & Moses' Digest of the Statutes of Arkansas) the Missouri Pacific could not have, even if it so wished, asked or obtained authority to construct this spur track. That statute reads as follows:

> "The commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expense, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practical a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such cross-

> ings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the state, county, municipality or other public authority in interest. Act April 1, 1919, p. 411, sec. 9; Crawford & Moses' Digest, sec. 1643."

In applying that statute it is a matter of indifference to the Commission whether the crossing is for a track already existing or yet to be constructed.

The St. Louis Southwestern Railway Company filed no pleading, and in stating its case to the Arkansas Railroad Commission its counsel confined himself to the mere statement, "the St. Louis Southwestern Railway Company is opposing the application" (R. 8). The Commission went at once into the testimony. Material testimony in such proceeding is such only as bears on the safety and convenience of the particular point asked for the crossing, whether it should be at grade and the terms and conditions of installation, cost and operation.

The applicant would not go to that hearing prepared to present evidence as to whether the proposed track was a spur track as distinguished from an extension of its line of railroad. The applicant would not be expected to try that question.

And we find that the Missouri Pacific Railroad Company at that hearing did not undertake to develop the facts on its contention that it was not an extension of its line of railroad. What its witnesses said about

the nature, purpose and surroundings of the track was merely incidental and bears only on the propriety of the particular point and manner of the crossing. The St. Louis Southwestern Railway Company's attorney appeared in opposition to the application and on cross-examination of the applicant's witnesses tried to develop facts on the question whether the proposed track was a spur track or an extension of the carrier's line of railroad. He also introduced some witnesses but their testimony was not aimed at that question, being confined substantially to the adequacy of the St. Louis Southwestern Railway Company's service. The facts developed at the hearing on the question of whether the track was a spur track or an extension of the carrier's line of railroad were fragmentory and incidental only.

In other words, that was not the question and could not be which the Arkansas Railroad Commission was being called upon to determine. And this is a case of the petitioner here trying to have this action determined on an issue not heard and determined by the trial tribunal and on testimony not directed to that issue. To do so would not further justice. Had that issue been before the trial tribunal this respondent could and would have adduced evidence supporting its contention that the proposed track is an industrial spur track and not an extension of its line of railroad. It would penalize the respondent and would work unduly in favor of the petitioner to decide this question without this respond-

ent having had an opportunity to present the evidence on that. Respondent could not have been expected to present its evidence on that contention when the question was not at issue.

THE RIGHT TO A CROSSING CAN NOT BE QUESTIONED IN THIS ACTION.

Petitioner can not in this action defeat or test this respondent's right to have a crossing over the petitioner's railroad. This is under the rule well settled in Arkansas that the only way to raise an issue on the right of a railroad to condemn property for its use, including a crossing of another railroad, is by a suit for injunction in a court of equity.

Neimeyer v. *Little Rock Junction Ry. Co.*, 43 Ark. 111.

Mountain Park Terminal Co. v. *Field*, 76 Ark. 239.

St. L., I. M. & S. Ry. Co. v. *Faisst*, 99 Ark. 61.

St. L., I. M. & S. Ry. Co. v. *F. S. & V. B. Ry. Co.*, 104 Ark. 344, 350.

In *Neimeyer* v. *Little Rock Junction Ry., supra,* the court said the proceeding by a railroad company under our statute to condemn a right-of-way is a special one and "no provision is made for any issue upon the RIGHT to condemn."

The other cases cited are to the same effect and further hold that the landowner is not without remedy against an illegal taking "and that the court of equity

will mould adequate remedy by injunction in order to give relief to the landowner'' (99 Ark., page 63).

The last-cited case, *St. L., I. M. & S. Ry. Co.* v. *F. S. & V. B. Co.*, applies the rule to an action by one railroad to condemn a crossing over another railroad (104 Ark. 350). The court said:

> ''The doctrine established by our previous decisions is that a railroad corporation is, by its charter, clothed with the power of eminent domain to the extent of its necessities, and that this gives it a *prima facie* right to condemn, which can not be questioned in a statutory action at law brought in the exercise of its power of eminent domain. *Neimeyer* v. *Little Rock Junction Ry. Co.*, 43 Ark. 111, settles that question, we think, beyond dispute, and the only remedy is by injunction granted by a court of equity or by transfer to such court for equitable relief for the purpose of ascertaining the right of a corporation to exercise the right of eminent domain. That is the same as an independent suit in equity for an injunction. This applies to a suit by one railroad to condemn for the purpose of crossing the line of another railroad. The statute gives the court in those cases only the right to ascertain 'the point and manner of such crossing,' in addition to ascertaining the amount of compensation to be paid. The Constitution of this State (art. 17, sec. 1) declares that 'every railroad company shall have the right with its road to intersect, connect with, or cross any other road;' and whenever that right is asserted in an action at law to condemn, it cannot be questioned in that forum. The only remedy is in a court of equity, to which the cause may be transferred on proper showing of facts sufficient to justify equitable re-

lief, as indicated in the decision referred to" (104 Ark. 350, 351).

Thus the statutory proceeding to enforce a crossing (equally with any other right-of-way) is only to ascertain (1) the point of crossing, (2) the manner of crossing and (3) the compensation for crossing and in such proceeding the right to have the crossing can not be denied.

The foregoing cases involved proceedings in the circuit court and under Section 8490, C. & M. Digest of Statutes of Arkansas, which provides that (1) the amount of compensation, (2) the point, and (3) manner of crossing shall be determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way; which is by a suit in the circuit court. But the principle and the rule must be the same in any other procedure substituted by statute.

In other words, if the Legislature has now substituted for the above-named suit in the circuit court a proceeding before the Railroad Commission to fix the point and manner of crossing, that substitution does not affect the application of the rule of the foregoing authorities. It still remains true that the right to the crossing cannot be denied except upon an issue made in a court of equity which would entitle to injunction.

This brings us to the question in what tribunal is the jurisdiction to enforce or condemn the crossing. As we have seen in the act of 1883 (Sec. 8490, C. & M.

Digest), it says the same (that is the (1) compensation, the (2) point, and the (3) manner of crossing) shall be ascertained and determined by a court of competent jurisdiction, in the same manner as provided for the ascertainment of damages for right-of-way for railroads, which puts it in the circuit court.

But in 1919 the Legislature enacted a statute in part as follows (now Section 1643, C. & M. Digest), which is the statute under which Missouri Pacific Railroad Company brought the action now at bar:

> "Crossings. The Commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable and to alter or abolish any such crossing and to require where, in its judgment, it would be practical, a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the State, county, municipality or other public authority in interest."

But the jurisdiction thus given the Railroad Commission doesn't reach to denying a crossing. A reasonable regulation of the exercise of the right of cross-

ing is all that is intended by the statute. And if it intended to give jurisdiction to prohibit or deny a crossing it would be unconstitutional. Because the Arkansas Constitution guarantees the right of crossing by one railroad over another.

Arkansas Constitution of 1874, Sec. 1 of Art. XVII, provides: "Every railroad company shall have the right with its road to intersect, cross and connect with any other road."

The Arkansas Supreme Court has held that the term "railroad" as used in that provision "includes all side tracks necessary or convenient for the company's business," and that a private industry track was so included.

> *Conway Oil & Ice Co.* v. *Gibson Oil Co.*, 175 Ark. 905.

Enforcing that right, the Legislature has enacted that a railroad corporation shall have the following among other powers:

> "Fifth: To construct their road upon or across any stream of water, watercourse, road, highway, railroad or canal which the route of the road shall intersect." (C. & M. Dig., Sec. 8450.)

It is also provided by the statute that:

> "Right to cross and intersect. Every railroad corporation created and organized under the laws of this State, or created and organized under the laws of any other State or the United States, and operating in this State, shall have the power to cross, intersect, join or unite its railroad with

any other railroad now constructed or that may hereafter be constructed at any point on its route and upon the grounds and right-of-way of such other railroad company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its construction. And every railroad company whose railroad is or shall be crossed, joined or intersected by any new railroad shall unite with the owners and corporation of such new railroad in forming such crossing, intersection and connection, and shall grant to such railroads so crossing, intersecting or uniting all the necessary facilities for that purpose as aforesaid."

Section 8489, C. & M. Digest of the Statutes of Arkansas:

"Compensation. If the two corporations cannot agree upon the amount of compensation to be made for the purpose set forth in the foregoing section, or the points or manner of such crossing, junctions or intersections, the same shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way for railroads."

Section 8490, C. & M. Digest of the Statutes of Arkansas.

Of this constitutional right of crossing, the Arkansas Supreme Court has said:

"Every railroad corporation takes its right-of-way subject to the right of the public to have constructed other highways across it when necessary in the same manner as it is subject to future

taxation or to reasonable regulations of the mode of using its property," and

> "It is true that the crossing imposes a new burden but it is one to which it is subjected by the nature of the case and the terms of its charter."

Cairo & Trumann Southern R. R. Co. v. *Ark. Short Line*, 172 Ark. 317, 322.

The Railroad Commission, substituted for the circuit court to determine the point and manner of crossing is subject to the same limitation as the circuit court with reference to having no power to determine any issue on the right to cross. If that right is to be questioned it must be in a suit for injunction in the chancery court as held uniformly by the foregoing authorities with reference to the circuit court.

So respondent, having the right to cross petitioner's railroad with this spur track (at least until the contrary is shown to the satisfaction of a court of equity), applied to the Arkansas Railroad Commission pursuant to Section 1643 of C. & M. Digest to fix the point and manner of its crossing. We call the court's attention that the respondent's petition to the Railroad Commission did not ask for authority to construct the track but merely that it have a crossing at the particular "point named and at grade and at petitioner's expense of construction and in accordance with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by your honorable body" (R. 3). The respondent's petition to the Railroad Commission does not submit any issue as to

respondent's right to construct the spur track nor as to its right to have a crossing over petitioner's railroad track. In line with the foregoing constitutional and statutory provisions and the decisions of the Arkansas courts, respondent did not conceive that the Railroad Commission had jurisdiction to pass on its right to build this spur track, nor to pass on its right to have a crossing over petitioner's railroad track other than to fix the point and manner thereof. The petition to the Commission therefore was confined to describing the location and character of the spur track which it intended to build and the track which it desired to cross and to stating the point and manner it desired and then prayed that it have said crossing at such point named and at grade and at applicant's expense and in accordance with the terms of installation, maintenance, operation and protection to be fixed by the Commission (R. 3).

Of course the petitioner is not without remedy, but it must pursue that remedy by the procedure fixed by our statutes and decisions, which is by suit for injunction in a court of equity. And it has pursued that remedy and has now pending in the United States District Court for the Western Division of the Eastern District of Arkansas its suit in equity against respondent to enjoin it from constructing said spur track on the grounds argued by petitioner in its brief in this case. In that suit will be settled the issues which it submits

here as a reason why respondent's right to cross petitioner's railroad track should be wholly denied.

Dated at Little Rock, Arkansas, this 4th day of October, 1932.

ROBERT E. WILEY,

Attorney for Respondent.